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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1049

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY MEMORANDUM TO RESPONDENTS' BRIEFS IN OPPOSITION

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The Government and railroad respondents misapprehend the position of these petitioners. We neither take issue with the lower court's characterization of demurrage as a facet of car service regulation nor contend that the Commission is without authority under section 1(6) of the Interstate Commerce Act to require the division of demurrage revenues. We say, rather, that the promulgation of any such divisions must observe the standards of section 15(6), as in the case of any other rates or charges. The Government respondents have offered nothing in reply.

The railroad respondents' contention that demurrage charges "in no way resemble" joint rates or

charges within the meaning of section 15(6) (Railroad Brief at 8) flies in the face of the industry practice of collectively establishing demurrage charges under procedures approved by the Commission pursuant to section 5b of the Act. *Railroads Per Diem, Mileage, Demurrage-Agreement,* 353 I.C.C. 673 (1977); *Association of American Railroads-Agreement,* 277 I.C.C. 413 (1950), *modified,* 300 I.C.C. 73 (1957). Their further suggestion (Railroad Brief, note 3 at 8) that the recodification of section 15(6) substantively removed a joint "charge" from its provisions is groundless.[1]

Respondents in their replies give a far broader reading to *Iverson* v. *United States,* 63 F.Supp. 1001 (D.D.C. 1946), and *ICC* v. *Oregon Pacific Industries, Inc.,* 420 U.S. 184 (1975), than the holdings in these cases permit. *Iverson* did not address the question before the Commission and the court below, whether demurrage charges were rates or charges within the meaning of section 15(6) of the Interstate Commerce Act. Rather the question there was whether, for purposes of the emergency provisions of section 1(15) of the Act, demurrage charges were "rules, regulations, or practices then established with respect to car service." As Judge Prettyman said in *Iverson, supra,* 63 F.Supp. at 1003:

> "The question in the case at bar is whether the computation of 'free time' and the scale of demurrage charges are rules with respect to the use, supply or movement of cars. If so, the orders of the Commission, involved in this action, were within its emergency powers; if not, they are invalid because issued without hearing."

[1] The original language of former section 15(6)(a) referred to the divisions of "joint rates, fares, or charges." Language in the recodification of this provision, 49 U.S.C. § 10705 refers to the divisions of joint "rates," which by explicit definition includes a "rate, fare, or charge for transportation." 49 U.S.C. § 10102(19); *See* H.R. Rep. No. 95-1395, 95th Cong., 2nd Sess. 73 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS No. 10, p. 76.

After a lengthy and scholarly discussion of demurrage, Judge Prettyman answered the question:

> "As an integral part of the rules and regulations in respect to car service, they [demurrage charges] fall within the provisions of section 1(15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing, issue, effective for a limited time, orders in respect to these charges." 63 F.Supp. at 1005-1006.

ICC v. *Oregon Pacific Industries, Inc., supra,* 420 U.S. at 190-191, similarly involved only section 1(15); indeed, this Court pointed out that the one question it was deciding pertained to the power of the Commission to promulgate its emergency order reducing the hold time at the reconsignment point.[2]

The ingenious argument most strenuously made by the Government respondents, but made as well by the railroad and shipper respondents, that the doctrine of *SEC* v. *Chenery Corp.,* 332 U.S. 194 (1947), does not apply because both the reviewing court and the Commission concluded that no rebate of rates or charges would result from the division of demurrage ordered distorts completely the rule of that case.[3] The lower

[2] *Oregon Pacific* involved reconsignment, not demurrage, as claimed by Government respondents.

[3] Railroad respondents' reliance upon *Milk Transport, Inc.* v. *ICC,* 190 F.Supp. 350 (D.Minn. 1960), *aff'd mem.,* 368 U.S. 5 (1961), is altogether misplaced. That case involved the construction of the 1958 amendment to the Interstate Commerce Act conferring grandfather rights upon certain classes of motor carriers, a situation that does not obtain here.

court stated that remittance of demurrage charges was not a rebate upon a ground not advanced by the I.C.C. That both the court below and the I.C.C. may have rejected the so-called "rebate argument" but upon altogether different grounds is exactly what *Chenery* is all about.

The holding of the Commission that a rebate does not result because "the delivering carrier will receive its full rate and compensation for all demurrage charges and will merely remit the excess to the car owner" (App. C, p. 70a) was not determined by the Court of Appeals to be an adequate or proper ground upon which the agency could base its decision. In fact, the holding by the Court of Appeals that demurrage was neither a rate nor a charge contradicts the very assertion by the Commission that a delivering carrier will receive its full rate and compensation.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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